THE PROGRESS OF THE LAW, 1919–1920

ESTATES AND FUTURE INTERESTS (*Concluded*)

CLASSES

I. In *In re Paul's Settlement* [150] funds were settled upon trust for A, a daughter of the settlor, for life, and after her death upon trust for her children or remoter issue as she by deed or will appoint and in default of appointment for all her children, with a gift over in default of issue upon trust for the children of the settlor's other children who, being male, should attain the age of twenty-one or, being female, should attain that age or marry. A had also a power under the settlement, which she exercised, to appoint one half of the trust fund to any husband who should survive her during the residue of his life or until his marriage. A died leaving a husband but no issue. During the life of the husband two of the seventeen grandchildren of the settlor reached twenty-one, and each claimed immediate payment of one-seventeenth of the one half of the capital not covered by the life estate of the widower and a similar share in the other half subject to his interpolated life estate. But the court was governed by *In re Faux*,[151] and held that the class of grandchildren remained open until the death of the widower. The decision shows the same reluctance as that in *Hill* v. *Chapman* [152] to deal with a whole fund in moieties, and to determine the class at different times for each moiety. In *Hill* v. *Chapman* the residue of personalty was left to grandchildren and a portion of it was set aside to pay annuities to servants. The court held that the grandchildren alive at the death of the testator took, to the exclusion of a brother born thereafter in the life of the annuitants, not only the residue not subject to the life interests but that portion which was subject thereto. Here the fund was treated as a whole and the class determined as

[150] [1920] 1 Ch. 99.
[151] 84 L. J. Ch. (N. S.) 873 (1915).
[152] 3 Bro. C. C. 391 (1791).

to the whole at the first possible period of distribution; in the principal case the fund was also treated as an entirety, but the class was left open until the later period of distribution. But is there any real objection to determining the class at one time for one moiety and at another time for the other? Rules for defining classes — often called rules of convenience — are to some extent artificial. But cannot they be molded to achieve the intent which the testator would probably have possessed had he given any thought to this contingency? Where a gift of income was concerned the court treated each year as a new period of distribution and allowed the class from time to time to fluctuate, thus permitting to participate as many members of the natural class as were consistent with convenience.[153]

II. In *Fletcher* v. *Los Angeles Trust & Savings Bank*[154] a trust was created to pay the income to the testator's daughter Annie K. Fletcher for life and upon her death to transfer the principal to the "children of said Annie K. Fletcher to be equally divided among them." Mrs. Fletcher at the age of 55 and her only child brought an action to terminate the trust. On the evidence of a physician that Mrs. Fletcher was past childbearing, the court ordered the fund to be paid to the plaintiffs. It said, "We think that the phrase 'to the children of said Annie K. Fletcher,' should be construed to apply exclusively to the children of her body and not to include adopted persons." The case has been criticized,[155] but must be deemed correct so far as the termination of the trust is concerned. It is a question of custody and management. But that a later adopted child could not take is another question.

III. In *In re Deloitte*[156] £3000 was left without any intervening life estate in trust for all the children of A who should, whether living at the death of the testatrix or born afterwards, attain twenty-one. The trustees were given power at discretion to advance one-third of "the presumptive or vested" share of such child. A had one child who was born before the testatrix died and attained twenty-one thereafter. Though A was still alive the Court of Appeal declared the son entitled to the whole fund. Under

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[153] *In re* Wenmoth's Estate, 37 Ch. D. 266 (1887).
[154] 28 Cal. App. Dec. 548 (1919).
[155] 7 CAL. L. REV. 353.
[156] [1919] 1 Ch. 209.

the terms of the gift the son of A on becoming of age was entitled to his share of the fund. There being no intervening life estate, that was the period of distribution. Under the rule of *Andrews* v. *Partington* [157] the class then closed, and after-born members were not admitted. The court met the argument that the use of the term "vested," in the advancement clause, by the testator showed that he intended to include all children, by saying the word applied to another gift in the will of £4000 to the children of A after a prior life estate. *Bateman* v. *Gray* [158] was discredited.

Powers

I. In *McCormick* v. *Security Trust Co.*[159] one E had a special power of appointment over certain land exercisable by deed or will among her children. She had a life estate in the land, but besides the power no other interest. She conveyed part of the land to her son T in fee by deed, reserving a life estate in herself but not mentioning the power. By will she devised all her property to her four children, including T, in equal shares, but again said nothing of the power. The Kentucky statute [160] read thus: "A devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The Kentucky court, following established principles,[161] held the power exercised by both instruments.

The New York statute,[162] which resembles the Kentucky act, is thus worded: "Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication." The New York Supreme Court has recently said, that if the donee of the power has an individual interest in the subject of the power as well as his power to appoint, a general de-

[157] 3 Bro. C. C. 401 (1791).
[158] L. R. 6 Eq. 215 (1868).
[159] 184 Ky. 25, 211 S. W. 196 (1919).
[160] Kentucky Stats. (1915), § 4845.
[161] The authorities are collected in 1 Tiffany, Real Property, 2 ed., § 324.
[162] Consol. Laws, Real Property Law, § 176.

vise will not operate an execution of the power.[163] This seems to have been the law of England prior to the Wills Act of 1837, which contained the forerunner of the Kentucky and New York Acts.[164] Since then the personal ownership of the donee should be only one circumstance, not conclusive, in determining whether the statutory presumption is rebutted.[165]

II. A power of appointment over real and personal property in favor of a child "in such manner" as the donee by will appoint is well exercised by an appointment to a trustee in favor of the child.[166]

Rule Against Perpetuities

I. In *Lewis Oyster Co.* v. *West*,[167] Lewis conveyed a dock and premises to West, who covenanted for himself, his heirs, executors and administrators, with Lewis, his heirs and assigns, that if "said "West" should sell certain oyster grounds, he would, at the option of "said Lewis" expressed six months from the time Lewis received from West written notice that the oyster grounds had been sold, reconvey the dock and premises to Lewis for a substantial price. The Connecticut court on a construction of the whole instrument found that the power of exercising the option was not confined to the lives of Lewis and West, and held Lewis' future interest void as too remote. One has no difficulty either in reason or in authority in supporting the case. The court in *London & S. W. Ry. Co.* v. *Gomm*,[168] held an equity created by a covenant to reconvey on notice for £100 land to the railway company, whenever necessary for the railway works of the company, to be a future interest in land which was too remote. It is an executory interest which may not vest in possession until after the limit allowed by law. This case has had a following in this country.[169] In Illinois a contract under seal to reconvey whenever the original owner,

[163] Duff *v.* Rodenkirchen, 110 Misc. 575, 182 N. Y. Supp. 35, 38, 39 (1920).

[164] 1 Vict., c. 26, § 27.

[165] Moore *v.* Avery, 225 S. W. (Ark.) 598 (1920); Amory *v.* Meredith, 7 Allen (Mass.), 397 (1863); Lockwood *v.* Mildeberger, 159 N. Y. 181, 54 N. E. 803 (1899); Farwell, Powers, 2 ed., 235; 1 Tiffany, Real Property, 2 ed., § 324.

[166] Greenough *v.* Osgood, 235 Mass. 235, 126 N. E. 461 (1920).

[167] 93 Conn. 518, 107 Atl. 138 (1919).

[168] 20 Ch. D. 562 (1882).

[169] Professor Woodbine in 29 Yale L. J. 88. But see Professor Rood in 14 Mich. L. Rev. 231.

his heirs or assigns, should demand in writing and pay the purchase money, was held too unfair for a court of equity to enforce.[170] In dealing with options it has been pointed out that if the holder of the option had paid the purchase money in advance and had under his contract a power to call for a conveyance at any time merely by giving notice, the Rule against Perpetuities would not be violated, for he would in fact be dominus of the property, and the holder of a present not a future interest.[171] Thus a general power to appoint by deed given to the unborn child of a living person is not too remote though it may possibly be exercised one hundred years hence, for upon birth the donee has the power to appoint to himself, and is, therefore, from that moment the owner of the property.[172] And this is the point which is most difficult to deal with in questions of remoteness of interests created by options to purchase. The mere fact that the power of calling for a conveyance is subject to a condition precedent is not conclusive against the holder being dominus of the land. The extent of his control over the performance of the condition and the burden it imposes on him are of importance. If he has merely to give notice in writing to acquire title he has a present interest. But the needing the land for business operations, as in the Gomm case, or the paying a substantial price for a reconveyance, as in the Illinois case, are not so fully within the control of the holder of the power as to prevent his interest from being future. These are Mr. Kales' conclusions,[173] and, it is submitted, they are sound. The principal case presents no such difficulty, for the condition is in the control not of the holder of the option but of the other party. The court treated with appropriate brevity counsel's contention that the future interest was destructible by the covenantor, the person for the time being entitled to the property, and therefore not within the Rule.[174]

II. In *Eastman Marble Co.* v. *Vermont Marble Co.*[175] the court held that a power created by covenant in A, his heirs, executors, administrators and assigns, of acquiring from a corporation title to nine-tenths of a lot for $2800 with interest and taxes at

[170] Bauer *v.* Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634 (1904).
[171] KALES, FUTURE INTERESTS, 2 ed., § 665.
[172] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 477.
[173] KALES, FUTURE INTERESTS, 2 ed., § 665.
[174] 93 Conn. 518, 107 Atl. 138, 143 (1919).
[175] 236 Mass. 138, 128 N. E. 177 (1920).

any time within twenty-five years created an equitable interest in land void for remoteness. And it further said the contract was void for remoteness so far as recovery of damages was concerned. But no case holds that contract rights are within the Rule, and authority is against the latter part of the decision.[176] If we were today able to start with a clean slate, the Rule against Perpetuities which we would develop might differ from the existing law. For instance, we might condemn a vested interest after a long term for years.[177] It is a matter, however, that should be left to the legislature.[178]

III. In the Colorado case of *Miller* v. *Weston*[179] the testator by the second paragraph of his will left his property on the admission of the will to probate to executors and trustees upon trust to convert and distribute in payment of legacies; and by the fourteenth paragraph directed his executors "as soon after my decease as reasonably may be practicable without material sacrifice of the value of my estate" to sell enough of his property to pay legacies and distribute the funds thus realized "as early as may be done consistently with fair money returns from said estate." The court correctly held that the vesting of the title in the executors and trustees under paragraph two violated the Rule, in spite of the Connecticut decision of *Belfield* v. *Booth*[180] to the contrary. In the latter case the trustee under a will was to make final distribution fourteen years after the executor had settled with the judge of probate; and it was held that the time of the commencement of the trust could not under the laws of Connecticut be delayed more than seven years. The Colorado court supports Mr. Gray's criticism of this assumption.[181]

This objectionable portion, the court continued, being void, is to

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[176] Worthing Corporation *v.* Heather, [1906] 2 Ch. 532. GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 273*a*, 329–330*c*.

[177] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 970–974.

[178] See some interesting suggestions of Professor Freund in 33 HARV. L. REV. 526, 535–541.

[179] 189 Pac. (Col.) 610 (1920).

[180] 63 Conn. 299, 27 Atl. 585 (1893).

[181] Mr. Gray, after suggesting probable contingencies that might well delay the settlement of an estate beyond seven years, proceeds, "or if such delay is absolutely impossible in the *Saturnia regna* of Connecticut, the case can hardly be an authority in jurisdictions in which justice is not so speedy." RULE AGAINST PERPETUITIES, 3 ed., § 214*c*. It would be interesting to see to what extent the probate records of Connecticut bear out the statement of its Supreme Court.

be erased from the will, and title to the estate thus passed to the heirs determinable upon conveyance by the executor under the powers given by paragraph fourteen. And this paragraph, it held, did not violate the Rule, for the sale directed thereunder must be made within a reasonable time, which on a fair construction of the language of the will, urging speed, could not last longer than twenty-one years.[182] The court effectuated, therefore, the intent of the testator without sacrifice of sound reason.

IV. A new doctrine of remoteness of charitable trusts is developed in *Herron* v. *Stanton*.[183] The residue of an estate was left to the "Art Association of Indianapolis, Ind.," an existing corporation, provided that the art gallery established thereby should include in its designation the name of the testator. If the association did not comply with the condition, the residue was directed to be distributed among such charitable organizations in Indianapolis as the executor might select. The Appellate Court of Indiana held that the gift over to such charities as the executor select was void for remoteness, and that the art association held the absolute interest free from the condition.

Apart from remoteness the gift to such charities as the executor designate is a charitable trust, not void for indefiniteness.[184]

It is probably settled — certainly it has never been doubted in the first three — that in the four cases following, the second gift is void for remoteness.[185] (1) To A on a charitable trust, — on a remote contingency to B, for his own use. (2) To A on a charitable trust, — on a remote contingency in trust for B. (3) To A for his own use, — on a remote contingency to B on a charitable trust. (4) To A in trust for B, — on a remote contingency on a charitable trust.

But where the gift is to one charity and then on a remote contingency to another, the judicial opinion that exists is in favor of the validity of the second interest and an exception to the Rule against Perpetuities.[186] The exception has led to this. In the

[182] Brandenburg *v.* Thorndike, 139 Mass. 102, 28 N. E. 575 (1885); GRAY, RULE AGAINST PERPETUITIES, 3 ed., 214*a*, 214*c*.

[183] 128 N. E. (Ind. App.) 363 (1920).

[184] SCOTT, CASES ON TRUSTS, 276.

[185] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 592–596.

[186] Christ's Hospital *v.* Grainger, 16 Sim. 83 (1847); 1 McN. & G. 460 (1848); 1 H. & Tw. 533 (1849); Storr's Agricultural School *v.* Whitney, 54 Conn. 342, 8 Atl. 141

case of *In re Tyler* [187] the testator bequeathed property to trustees for a charity and provided that, if they should at any time neglect to repair the testator's family vault, the fund should pass to the trustees of a different charity. The gift over was held valid. If this be true, it might be argued that a gift can be made to Harvard College on condition that the President and Fellows pay every year a designated sum to the testator's then heirs; but if they fail to do so the fund to go to Yale University; and that thus a man could provide forever for his family. In neither this case nor in *In re Tyler* has the condition anything to do with the administration of either charity. Mr. Gray has suggested that if land is taken wholly out of commerce, as it is when there is a gift from one charity to another, there is no occasion to apply the Rule which is aimed at preventing property being unmarketable. But he also suggests and leaves this to the judgment of the "learned reader" whether another reason for the Rule is not "that when property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man's own." "These considerations apply with full force to charities." [188]

On the whole, these latter arguments and the result of *In re Tyler* lead us to prefer no exception in the case of a gift from one charity to another,[189] and to approve the result of the principal case, which as a decision stands alone. Unfortunately the court gave little consideration to the point, and cited as the leading authority for its position *Brattle Square Church* v. *Grant*.[190] In that case the prior gift to the charity was on the condition that if it was not put to the designated purpose the land should revert to the testatrix's estate, and she then gave it to her nephew and his heirs. Here there was no gift from one charity to another; but either a gift to a charity with a possibility of reverter, or such a gift with an executory devise over to an individual, in either case a situation governed by entirely different considerations.[191]

(1887); MacKenzie *v*, Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 669, 61 Atl. 1027 (1904); GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 597.

[187] [1891] 3 Ch. 252.

[188] GRAY, RULE AGAINST PERPETUITIES, 3 ed., 603*a*, 603*e*–603*h*.

[189] Professor Scott in 65 U. OF PA. L. REV. 632, 640–642.

[190] 3 Gray (Mass.), 142 (1855).

[191] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 40, 41, 592.

V. A trust for the perpetual care of a cemetery lot is void in the absence of statute permitting it.[192] Mr. Gray thought the reasons were that it could not be supported as a charitable trust, and that there were no beneficiaries to enforce it.[193] But these suggestions run counter to the view, supported by a little authority, that if the trust is to last not longer than the limits set by the Rule against Perpetuities, it is valid.[194] It is assumed in the cases, which hold the trust invalid because it may last till a more remote period, that such provisions of a will violate the Rule.[195] Mr. Gray is entirely right in condemning this as the basis of invalidity.[196] The interest vests within the prescribed limits, and the Rule is no more violated than when a fee simple is given presently to A and his heirs.[197] But the real difficulty is that such perpetual provisions create an indestructible trust for private purposes which may be effective years hence. That such provisions are void has been recognized in decisions,[198] and by leading text writers.[199] And it is predicted that by analogy the period fixed by the Rule against Perpetuities will be adopted as the limit of a valid indestructible private trust.[200] A recent Rhode Island case [201] has thrown no further light on the subject. It merely decides briefly that a bequest of stock in trust to apply the dividends to repairing and caring for the family burial lot is void as a private trust in per-

[192] SCOTT, CASES ON TRUSTS, 282.

[193] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 894–909*a*.

[194] Angus *v.* Noble, 73 Conn. 56, 46 Atl. 278 (1900); Leonard *v.* Haworth, 171 Mass. 496, 51 N. E. 7 (1898); Pirbright *v.* Salwey, WEEKLY NOTES (1896), 86.

[195] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 898, 899; KALES, FUTURE INTERESTS, 2 ed., § 660; Professor G. L. Clark, 10 MICH. L. REV. 32–35.

[196] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 898.

[197] *Ibid.*, § 232.

[198] Bigelow *v.* Cady, 171 Ill. 229; Pennsylvania Co. *v.* Price, 7 Phila. (Pa.) 465; Williams *v.* Herrick, 19 R. I. 197; Sadler *v.* Pratt, 5 Sim. 632. And see Fry *v.* Capper, Kay, 163 (1853); *Re* Teague's Settlement, L. R. 10 Eq. 564 (1870); *Re* Ridley, 11 Ch. D. 645 (1879). But see Howe *v.* Morse, 174 Mass. 491, 55 N. E. 213 (1899).

[199] Mr. G. L. Clark, 10 MICH. L. REV. 36–41; GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 121*i*, 121*iii*; KALES, FUTURE INTERESTS, 2 ed., §§ 658, 659; SCOTT, CASES ON TRUSTS, 282, 65 U. OF PA. L. REV. 632, 642.

[200] Mr. G. L. Clark, 10 MICH. L. REV. 41; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 121*i*; Mr. A. W. Scott, 65 U. OF PA. L. REV. 632, 642; Mr. Gray thought that in calculating the period we should begin from the beginning of the interest, § 121*iii*. Mr. Kales's view, that we should start from the testator's death, is, however, likely to prevail. *Re* Ridley, 11 Ch. D. 645 (1879); 19 HARV. L. REV. 598, 604 n.; 20 HARV. L. REV. 192, 202.

[201] Shippee *v.* Industrial Trust Co., 110 Atl. (R. I.) 410 (1920).

petuity. No suggestion is given whether by perpetuity is meant the Rule against Perpetuities, which of course does not apply, or the more modern rule, above indicated, making void certain indestructible trusts. But this is a common error.[202]

VI. A right of entry for condition broken has been held, and held consciously, in Colorado not to be within the Rule against Perpetuities.[203] This is the law in the United States, though in many of the cases the courts were unaware that they were passing on the point.[204] The law of England,[205] reason, and expediency are the other way.[206]

Professor Freund in a recent article has made some suggestions in regard to the separability of limitations, and the policy against remoteness and particularly its application to presentation against estates of claims payable at a remote date.[207]

VII. If personal property is bequeathed in trust to pay the income to such persons as A shall by will appoint and A by will appoints to B, who was not living at the death of the testator, for life and on B's death to his children, is the appointment to B's children good? Mr. Gray [208] emphatically answered this question in the negative; Mr. Kales [209] and Mr. Thorndike [210] with equal emphasis in the affirmative. The English law [211] on the whole is in favor of the interest; the American law against it.[212] Massachusetts has recently fallen in line with Mr. Gray and the American decisions.[213] Where a power is general to appoint by deed or will

[202] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 898–899. Compare Smith *v.* Heyward, 104 S. E. (S. C.) 473 (1920).

[203] Strong *v.* Shatto, 187 Pac. (Cal.) 159 (1920).

[204] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 304–307.

[205] *In re* Hollis's Hospital, [1899] 2 Ch. 540.

[206] GRAY, RULE AGAINST PERPETUITIES, § 304. But Mr. Kales for historical reasons believes our law to be correct. KALES, FUTURE INTERESTS, § 662.

[207] 33 HARV. L. REV. 526, 531, 535.

[208] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 526–526*b*; 948–969.

[209] 26 HARV. L. REV. 64; KALES, FUTURE INTERESTS, 2 ed., §§ 693–695.

[210] 27 HARV. L. REV. 705, 709.

[211] Rous *v.* Jackson, L. R. 29 Ch. D. 521 (1885); *In re* Flower, 55 L. J. Ch. 200 (1885); Stuart *v.* Babington, L. R. 27 Ir. 551 (1891). *Contra*, *In re* Powell's Trusts, 39 L. J. Ch. 188 (1869).

[212] Reed *v.* McIlvain, 113 Md. 140, 77 Atl. 329 (1910); Genet *v.* Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); Lawrence's Estate, 136 Pa. 354, 20 Atl. 521 (1890); Boyd's Estate, 199 Pa. 487, 49 Atl. 297 (1901). See MINNESOTA, GEN. STATS. (1913), §§ 6780, 6781; Hershey *v.* Meeker County Bank, 71 Minn. 255, 73 N. W. 967 (1898).

[213] Minot *v.* Paine, 230 Mass. 514, 120 N. E. 167 (1918).

the rule is undoubted that for the purposes of the Rule against Perpetuities the validity of the exercise of the power depends not on the distance of vesting of the interest appointed from the creation of the power but from the time of the exercise thereof.[214] The donee of such a power has an interest so closely approximating ownership that his exercise may be considered as a fresh starting point for the purposes of the Rule. He has the present unconditional right to acquire the absolute interest. And when he exercises the power he is in effect limiting his own interest.

The present problem concerns itself with the inquiry whether this result can be reached in the case of a donee living at the testator's death who by the will has been given a general power exercisable by will only. Against reaching this result it may be said that the donee, far from being able to appoint to himself and become absolute owner, is the only person to whom the appointment can surely not be made. He, therefore, does not come under the exception to the general doctrine that the exercise of powers for the purposes of the Rule must be referred to the time of their creation.[215] Mr. Kales points out that the power itself is valid to start with, for it must be exercised in lives in being at the time of its creation. He then says that though the donee of the general power by will is not practically owner at the time of the creation of the power, he certainly becomes so at his death, and, if he becomes such an owner within the limits of the Rule, his exercise is entitled to be judged from that juncture.[216]

Mr. Kales has had the last word. In his new edition published since *Minot* v. *Paine* he suggests that the rule there established tends to set a trap for testators, in making a distinction between general powers exercisable by deed or will and those exercisable by will only. And he answers a difficulty, put to him by Mr. Gray in correspondence and suggested in Mr. Gray's book;[217] *i. e.* an unfortunate result of the later English cases is that if A have a general power to appoint by will and appoints to B for life and then as B shall by will appoint, this device may be kept up throughout the alphabet. The reply is that the scheme is highly objec-

[214] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 524.
[215] *Ibid.*, § 952.
[216] KALES, FUTURE INTERESTS, 2 ed., §§ 693, 695.
[217] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 514.

tionable, but that A's appointment to B for life and then as B by will appoint is void, apart from the Rule, under the newer doctrine that a substantial restraint on the alienation of the fee simple to last until a remote period is illegal. Such a restraint is here created by splitting up the interests, so that reckoning from the death of A's testator the alienation of the fee has been seriously restricted for longer than lives in being and twenty-one years.[218]

It is said elsewhere by way of analogy in support of the view assimilating powers by will to powers by deed or will that the appointed property often by judicial decision and statute is subject to the inheritance taxes as descended from the donee.[219] Much reliance, however, cannot be placed on this suggestion, for courts and legislatures often treat similarly special powers. No one contends that for purposes of the Rule special powers should be dealt with in the same fashion as general powers by deed or will. Editorial comment on *Minot* v. *Paine* is divided.[220] Mr. Tiffany states the problem but expresses no opinion.[221]

VIII. There is a careful note in the *Columbia Law Review* [222] discussing a case in the Appellate Division of the Supreme Court of New York [223] which involved the distribution of unlawful accumulations, which pass under Art. III, Section III, of the Real Property Law "to the persons presumptively entitled to the next eventual estate."

IX. Minnesota adopted the provisions of the New York statutes on the subject of remoteness of interests in land,[224] but did not adopt those in regard to remoteness of interests in personal property. The Supreme Court has just decided that a trust to invest funds for the benefit of a class under the act for uses and trusts[225] is not

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[218] KALES, FUTURE INTERESTS, 2 ed., §§ 658, 695.

[219] 19 COLUMBIA L. REV. 65; GLEASON AND OTIS, INHERITANCE TAXES, 2 ed., 173–180.

[220] Supporting Minot *v.* Paine, 3 MINNESOTA L. REV. 134; opposing it, 19 COLUMBIA L. REV. 62.

[221] TIFFANY, REAL PROPERTY, 2 ed., § 334.

[222] 20 COLUMBIA L. REV. 887. See *ibid.*, 767.

[223] *In re* Kohler, 193 App. Div. 550, 183 N. Y. Supp. 550 (1920).

The Michigan statute is construed in Cary *v.* Toles, 210 Mich. 30, 177 N. W. 279 (1920), and in Woolfit *v.* Preston, 203 Mich. 502, 169 N. W. 838 (1918). See the remarks of Professor E. C. Goddard in 19 MICH. L. REV. 430–431.

[224] MINNESOTA STATS. (1913), §§ 6664, 6665.

[225] STATS. (1913), § 6710, subd. 5.

invalid where personalty is the subject matter of the trust because it may suspend the power of alienation beyond the period fixed by the statute as to land.[226]

X. An Elizabethan Bill against Perpetuities, which in 1597 the discussions of Chudleigh's case occasioned, is printed with comments by Mr. W. S. Holdsworth in 35 *Law Quarterly Review*, 258.

Restraints on Alienation

I. In an estate in fee simple a covenant against alienation, a condition or conditional limitation on alienation, is void everywhere. And the weight of authority and reason is against the validity of such covenant condition, or conditional limitation even when limited in time.[227] The Supreme Court of Illinois has just held a conditional limitation on alienation of a fee before the devisee reached thirty to be bad.[228] In Kentucky [229] it has just been said, following earlier cases in that commonwealth, that a provision in a will attached to a fee that the devisee should have no power to "sell or dispose of any part thereof until fifteen years have elapsed," prevented the owner from selling, but, on the special context, not from devising the land.

II. Two California cases have attracted widespread comment.[230] The Civil Code [231] has this provision: "Conditions restraining alienation, when repugnant to the interest created, are void." In *Title Guarantee & Trust Co.* v. *Garrot* [232] the grantee of a fee simple covenanted for herself, her heirs and assigns, not to sell or lease any portion of the premises to any person of African, Chinese, or Japanese descent, with a condition forfeiting the property on such

[226] *In re* Bell's Will, 179 N. W. (Minn.) 650 (1920); 30 YALE L. J. 429; 1 MINNESOTA L. REV. 226–229. See a recent article by Professor Oliver S. Rundell, "The Suspension of the Absolute Power of Alienation," in 19 MICH. L. REV. 235. The Michigan statute is construed in Cary *v.* Toles, 210 Mich. 30, 177 N. W. 279 (1920), and in Woolfit *v.* Preston, 203 Mich. 502, 169 N. W. 838 (1918). See 19 MICH. L. REV. 430–431.

[227] GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 45–54.

[228] McIntyre *v.* Dietrich, 128 N. E. (Ill.) 321 (1920).

[229] Speckman *v.* Meyer, 187 Ky. 687, 220 S. W. 529 (1920). And see McNamara *v.* McNamara, 293 Ill. 54, 127 N. E. 130 (1920).

[230] 8 CALIFORNIA L. REV. 107, 188; 20 COLUMBIA L. REV. 353; 18 MICHIGAN L. REV. 548; 68 U. OF PA. L. REV. 185.

[231] CALIFORNIA CIV. CODE, § 711.

[232] 183 Pac. (Cal.) 470 (1919).

sale or lease. The covenant and condition was not to last beyond January 1, 1925. The grantee sold the premises, which came by mesne conveyances to a negro of African descent. The District Court of Appeal held these provisions, whether operating as covenants or conditions, bad. The Supreme Court denied a rehearing. In *Los Angeles Inv. Co.* v. *Gary* [233] the fee of a city lot was conveyed with a covenant that the "property shall not be sold leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots"; and there was also a condition providing for forfeiture for breaches. In the deed the covenants and conditions were declared to be operative only until Jan. 1, 1930. The property was sold to and occupied by a colored man of African descent. The Supreme Court, approving the earlier case, held the covenants and conditions against sale, though limited as to persons and time, void, but declared a forfeiture for breach of the condition against occupation, which it held valid.

Both courts relied upon the code provision; but the District Court of Appeal said that it was declaratory of the common law. Both fell in line with authority in holding that the time limit placed on the restrictions against alienation did not affect their invalidity. That the restrictions are in the form of a covenant, condition, or conditional limitation, is immaterial.[234] That the restraints on alienation in the principal cases were qualified as to persons presents greater difficulty. The authorities being "in hopeless conflict," Mr. Gray suggested as a possible rule that "the condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes." [235] But this distinction cannot depend on mere form; and if alienation is allowed to all except a large number of large classes the test has reached a breaking point. This point is approached in the California cases. Moreover, the form of the restriction in the two deeds is not quite the same. To which category does the restriction in the later case, that "the property shall not be sold to any persons other than

[233] 186 Pac. (Cal.) 596 (1920).

[234] GRAY, RESTRAINTS, 2 ed., §§ 19, 29*a*; Prey *v.* Stanley, 110 Cal. 423, 427, 42 Pac. 908 (1895).

[235] GRAY, RESTRAINTS, 2 ed., §§ 31–44. But in § 44 Mr. Gray seems to think it wiser to disallow such qualified restrictions altogether.

of Caucasian race," belong? A conveyancer would have great difficulty in passing on these titles under this test.

Another criterion, which has been suggested by some authorities, is that the condition or covenant is bad only when all alienation is substantially fettered.[236] But this allows considerable restriction and is even more difficult of application by the conveyancer than the first. Furthermore, conditions are not in the United States subject to the Rule against Perpetuities.[237] And the repugnant and fettering whims of settlors and testators may with us last for centuries. Happy is the jurisdiction whose court, uncontrolled by prior decisions, or under the protection of a code provision, may declare all such restraints on alienation invalid. But two cases [238] within the decade have upheld them, on facts not very different from those in the decisions under discussion. The California courts were clearly right in saying the provisions did not violate the fourteenth amendment of the Federal Constitution, which applies only to action by the state not to contracts of individuals.[239]

But while the alienation cannot be restricted, the use of property may, and unless use by individuals — in the particular case — can be construed to mean a tenancy and therefore an alienation, the Supreme Court in the second case has gone a long way to nullify the effect of the prior decision.[240]

III. Restraints on alienation of legal life estates have recently been held void in Illinois.[241] The court overlooked an earlier Illinois case of which Mr. Kales says that it is "probably the only case in any jurisdiction in which a legal life estate has been held subject to an absolute restraint on alienation." [242]

IV. The validity of a gift of land or personalty, if the first taker who has been given a fee or absolute interest does not dispose of the property by deed or will, has often been questioned. As to personalty, the future interest may be held invalid because of uncer-

[236] GRAY, RESTRAINTS, 2 ed., §§ 43, 44.

[237] *Ante*, p. 648.

[238] Queensborough Land Co. *v.* Cazeaux, 136 La. 724, 67 So. 641 (1915); Koehler *v.* Rowland, 275 Mo. 573, 205 S. W. 217 (1918).

[239] 7 CALIFORNIA L. REV. 191.

[240] *Ibid.*, 190.

[241] Randolph *v.* Wilkinson, 128 N. E. (Ill.) 525 (1920).

[242] Christy *v.* Pulliam, 17 Ill. 59 (1855); Pulliam *v.* Christy, 19 Ill. 331 (1857); Christy *v.* Ogle, 33 Ill. 295 (1864); GRAY, RESTRAINTS, 2 ed., §§ 135, 138; KALES, FUTURE INTERESTS, 2 ed., § 730.

tainty and the great difficulty of ascertaining the subject matter of the gift over.[243] But no such explanation can be advanced for holding the devise over of land invalid, and the cases thus deciding have been severely criticized.[244] *In re Ashton*[245] reaches an absurd result. A bequeathed the residue of all his land and chattels to his sister B absolutely, but if B was at "her decease mentally unfit to manage her own affairs" then to his brother, C. Before A's death, B while sane made a will leaving A the residue of her estate. A died, and on B becoming insane the court held she took the absolute interest in A's property free from the gift to C. That was held bad as substantially a gift over on intestacy. In other words, if a man gives a relative an absolute interest in property and says, "if at your death you are capable of making an intelligent choice as to the disposition of your estate you are free to do so; but if you are not, I wish now to do it for you," such a clause is bad. Public policy, far from being opposed to such a conditional limitation, is in favor of it. Indeed, the provision was not one against intestacy except in a limited sense. If B died insane she would have died testate, for while competent she had made a will.

Spendthrift Trusts

On the subject of spendthrift trusts in Connecticut the *dicta* were conflicting down to 1899.[246] In that year a statute enacted that "Whenever property is given to trustees to pay over the income to any person, and there is no provision for accumulation, and the trustees are not expressly authorized to withhold such income, and the income is not expressly given for the support of the beneficiary or his family, such income shall be liable in equity to the claims of all creditors of such beneficiary." [247] A woman by will left all her property in trust to pay the income to her husband "for the sole and separate use of my said husband for and during all the term of his natural life, and so that the same shall not be

[243] Gray, Restraints, 2 ed., § 58.

[244] *Ibid.*, §§ 59–74g; Kales, Future Interests, 2 ed., § 723; Manley O. Hudson, 17 Missouri Bulletin, 8, Law Series, 11, pp. 37–55.

[245] [1920] 2 Ch. 481.

[246] Gray, Restraints, 2 ed., §§ 195–212. See Huntington *v.* Jones, 72 Conn. 45, 50, 43 Atl. 564 (1899); Mason *v.* Rhode Island Hospital Trust Co., 78 Conn. 81, 85, 61 Atl. 57 (1905); Holmes *v.* Bushnell, 80 Conn. 233, 67 Atl. 479 (1907).

[247] Connecticut Gen. Stats. (1918), § 5872.

liable for the contracts, debts or engagements of my said husband." The Supreme Court of Connecticut [248] has just said that the statute was exclusive and included all methods by which spendthrift trusts could be created; and that, as none of the essentials of such a trust mentioned in the statute appeared in the will, the husband's interest was liable for an indebtedness existing at the time of the will and the death of the testatrix. The court assumed that had the will been drawn to meet the statute an effective spendthrift trust could have been created, but declined to pass on the important question for the Connecticut conveyancer "whether the statute intends that all income may be given by such a trust to the support of the beneficiary and his family, or the support intended is limited to reasonable support in view of the station in life of the beneficiary, or limited in some other way." [249]

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[248] Carter *v.* Brownell, 111 Atl. (Conn.) 182 (1920).

[249] Carter *v.* Brownell, 111 Atl. (Conn.) 185 (1920). The case is commented on in 30 YALE L. J. 203.